FILED

SEP 01 2004

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Tan v. Ashcroft, Nos. 02-73212 & 03-71195

PAEZ, Circuit Judge, concurring and dissenting:

I concur in the disposition of Tan's original application for relief in Case No. 02-73212. I respectfully dissent, however, from the disposition of Tan's motion to reopen in Case No. 03-71195. Jen Djuan Tan has presented a compelling case for reopening the immigration proceedings in this case – that he was provided ineffective assistance of counsel at his removal hearing. In my view, the Board of Immigration Appeals abused its discretion in denying Tan's motion to reopen. Accordingly, I would grant the petition for review with regard to his motion to reopen (Case No. 03-71195) and remand for further proceedings.

Tan, a gay Chinese citizen of Indonesia, was raped by three Muslim natives in a public bathroom in 1989. Although he discussed the incident with his counsel, Tan did not disclose (1) that he had been raped or (2) that the three men targeted him on account of his sexual orientation. In his motion to reopen, Tan explains that his initial reluctance to volunteer these details stemmed from his lingering trauma from the rape and his internalized shame about his sexual orientation. When counsel later acknowledged that he knew that Tan was gay, Tan specifically asked whether he should disclose his sexual orientation to the immigration judge and whether "it was in any way relevant to [his] case." Without asking *any* questions, counsel advised Tan not to mention his sexual orientation to

the immigration judge.

Accepting Tan's version of events as true,[1] he has sufficiently demonstrated that his counsel's ineffective assistance resulted in "a denial of due process under the Fifth Amendment [because] the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *See, e.g.*, *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226 (9th Cir. 2002) (quoting *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir.1985)). By advising Tan not to disclose his sexual orientation, counsel foreclosed a potentially meritorious claim of sexual orientation persecution and effectively denied Tan the opportunity to bring his full claims before the immigration judge. *See Lin v. Ashcroft*, 377 F.3d 1014, 1025 (9th Cir. 2004) (holding that the Board of Immigration Appeals abused its discretion in denying a motion to reopen where counsel had failed to investigate and present the factual and legal basis of an asylum claim).

Counsel's advice is especially troubling in light of his failure to ask Tan whether he had suffered past persecution in Indonesia on account of his sexual orientation, or whether he feared future persecution in Indonesia on account of his sexual orientation. Simple perlustration, well short of extispicy, would have

[1] In evaluating a motion to reopen, we are "required to accept the facts stated in the alien's affidavit unless they are inherently unbelievable." *See Ordonez v. INS*, 345 F.3d 777, 786 (9th Cir. 2003).

revealed that Tan had a potentially viable asylum claim based on his sexual orientation.[2] "Counsel's unreasonable failure to investigate and present the factual and legal basis of [his client's] asylum claim would itself amount to ineffective assistance of counsel." *Id.*

The majority faults Tan for not explicitly informing his counsel that he was attacked in 1989 *because* he was homosexual. Memorandum at 4. This erroneously shifts the focus away from his counsel's failure to ask Tan whether he was persecuted because of his sexual orientation to Tan's reluctance to volunteer information about his sexual assault. *See Maravilla v. Ashcroft*, No. 03-70467, 2004 WL 1853455, at *2 (9th Cir. Aug. 19, 2004) ("By presuming that petitioners should have presented the evidence, the [Board] short-circuits the central

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[2] Counsel acknowledged that he knew Tan was gay in April 2001. By that time, both the Ninth Circuit and the Board of Immigration Appeals had held that homosexuals were "a particular social group" eligible for asylum relief. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093-94 (9th Cir. 2000); *In re Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990). In fact, in his affidavit, counsel acknowledged that an alien's sexual orientation was "a crucial fact" in an asylum claim and that he previously had "tried and won gay-Indonesian-Chinese asylum cases before the Immigration Court." A reasonably competent counsel, armed with this information and experience, would not have advised his client to remain silent about his sexual orientation – at least without first determining whether his client's sexual orientation was related to any possible claim of persecution. Having acknowledged that Tan's homosexuality was a potentially relevant issue, counsel's failure to "investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins v. Smith*, 123 S. Ct. 2527, 2537 (2003).

questions: whether *their counsel* was unconstitutionally ineffective in failing to present the evidence and, if so, whether petitioners were prejudiced by their counsel's performance.") (emphasis added). We have noted that rape victims are often reluctant to reveal information about their sexual assault. *See Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002). Tan, who did not know that his sexual orientation was a potential ground for asylum, should not be faulted for failing to press the issue of sexual orientation after his counsel implied that it was not relevant. *See Rodriguez-Lariz*, 282 F.3d at 1225 (rejecting the government's argument that petitioners waived their rights by relying on counsel because "[p]etitioners were unfamiliar with the INS' administrative process and relied on [their attorney] to protect their interests"); *see also Monjaraz-Munoz v. INS*, 327 F.3d 892, 896 (9th Cir. 2003) ("it is reasonable that an alien would give effective control of his or her case to retained counsel").

Tan's "right to a full and fair presentation of his [asylum] claim included the right to have an attorney who would present a viable legal argument on his behalf supported by relevant evidence . . . ." *Lin*, 377 F.3d at 1025. Here, counsel knew that Tan had been persecuted in Indonesia and that Tan was gay, but never investigated the possible connection between these two facts. And when Tan

asked whether he should reveal his sexual orientation to the immigration judge, counsel advised him not to disclose his sexual orientation. In my view, a reasonably competent counsel would have acted otherwise. *See Maravilla*, 2004 WL 1853455, at *2 (explaining that consideration of ineffective assistance claims should *begin* by asking "if competent counsel would have acted otherwise").

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"[W]e have reopened proceedings where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening." *Ordonez*, 345 F.3d at 785 (internal quotation marks omitted). I believe that this is such a case. Accordingly, I would grant Tan's petition for review with regard to the motion to reopen.